Filed 12/30/04 P. v. Johnson CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DENNIS JOHNSON, Defendant and Appellant.	B174779 (Los Angeles County Super. Ct. No. BA255537)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Modified and, as modified, affirmed with directions.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Richard F. Katz and William T. Harter, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

Dennis Johnson appeals from the judgment entered following his convictions by jury of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1); count one) and second degree robbery (Pen. Code, § 211; count two), each with personal infliction of great bodily injury (Pen. Code, § 12022.7), and assault (Pen. Code, § 240),[1] with admissions that he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)) and a prior serious felony conviction (Pen. Code, § 667, subd. (a)). He was sentenced to prison for 20 years.

In this case, we hold (1) there was sufficient evidence that appellant committed robbery, including sufficient evidence that the subject property belonged to the victim and that appellant had the requisite intent to steal, (2) the trial court did not err by failing to instruct sua sponte on the claim of right defense, because there was no substantial evidence that the claim was proffered in good faith; and (3) appellant's conviction for assault must be stricken.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that about 9:30 a.m. on October 24, 2003, Yessica Aranda was in her office at Alonso's Produce located at 547 Seaton. Aranda owned the business. Aranda heard banging, screaming, and "a lot of noise coming into the office." Aranda closed and locked her door, then called 911.

Aranda heard a woman screaming, and testified she also heard "a man banging against a wall and throwing things." Workers outside were yelling. Aranda testified she heard a lot of noise and "thought that someone came in to rob." She also testified she thought that someone entered to rob "[b]ecause I heard, 'Give it to me. Give me my jewelry. Give me this. Give me that.'" The noise ended after about five minutes, and Aranda exited her office. Aranda saw a woman, later identified as Tricia G. (Tricia),

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1 Appellant's motion for judgment of acquittal was granted as to count three, which alleged that appellant committed criminal threats (Pen. Code, § 422). He was acquitted on count four, which alleged he committed corporal injury to a cohabitant (Pen. Code, § 273.5, subd. (a)), but, as discussed *post*, he was convicted of the previously mentioned assault as a lesser included offense of count four.

sitting. Tricia was bleeding from her left eye, and Aranda gave her first aid. Tricia did not testify at trial.

Between 9:30 and 9:45 a.m. on October 24, 2003, Martin Gonzales, who worked at the business, was in its warehouse when he saw Tricia run into the office screaming and repeatedly demanding help. A Black male, appellant, also ran into the office. Gonzales testified that appellant was saying, "'Give me my stuff.'"

Gonzales also testified that Gonzales ran into the office and saw Tricia "on the desk, trying to reach for the phone, calling 911." The telephone was in Tricia's hand. Gonzales kept telling appellant, "'You can't be in here[.]'" Tricia already had dialed 911 when appellant grabbed the telephone and hung it up. Tricia's arms were over her head, and she was screaming. Gonzales testified that while Tricia was lying on the desk, appellant was saying "'Give me my stuff. Give me my gold' -- she had on a gold bracelet and earrings -- and 'Give me my stuff.'" Tricia replied, "'No, no.'"

Appellant grabbed Tricia's hand and tried to rip a gold bracelet or watch off her hand. Gonzales testified that appellant was yelling at Tricia, "'Give me the rest of my stuff. Give me my shit.'" Tricia was covering her face and screaming, "'Leave me alone[.]'" Tricia was covering her face because appellant was yelling at her. Appellant subsequently hit Tricia in her face with his fist. Appellant, who was about six feet three inches tall, hit Tricia several times while she was on the desk.

Gonzales pushed appellant away. Tricia tried to open the door of Aranda's office. Aranda was in her office, so Gonzales kept its door shut to prevent Aranda from being harmed. Gonzales testified that while Tricia was trying to get into Aranda's office, Tricia was screaming and covering her head because appellant was "just whaling on her a couple more times." Appellant was constantly hitting Tricia in the face, and she was screaming hysterically.

Gonzales told appellant that appellant could not be in there. Gonzales pushed appellant away, went to the telephone, and dialed 911. Appellant took the phone from Gonzales and hung it up. Gonzales testified he got the telephone again.

The following then occurred during the prosecutor's direct examination of Gonzales: "Q You talked about a gold bracelet or a watch? [¶] A . . . I think it was a bracelet or -- [¶] Q What happened to that? [¶] A He had one in his hand, and I think he got the other and put it in his pocket. [¶] Q How did he get it off her wrist? [¶] A He couldn't get it off. He just snagged it off and just took it off. The earrings, he didn't take off the earrings; she took off the earrings. [¶] Q She removed the earrings? [¶] A Yes. [¶] Q And when she did that, did she have any injuries to her face? [¶] A . . . her face was all bloody. [¶] Q Did you see what he did with the jewelry that he took? [¶] A There's one that he . . . put in his pocket, and the other one he had in his hand. [¶] Q And when he had the other one in his hand, did he leave, or did he do something else before he left? [¶] A He was still telling her off, . . . [¶] Q Did he hit her after that? [¶] A He hit her a couple more times, and then he left. [¶] After he hit her the last time, that's when I got the phone and dialed 911. And when I was going to dial 911, he just said, 'No,' and grabbed it away. [¶] Q And is that when he got her to give him the jewelry? [¶] A Yes. And he was just hitting her more times." Blood was coming from above, and next to, Tricia's eye.

During the time appellant was beating Tricia, and Gonzales was trying to intervene, Tricia was repeatedly demanding help. Once appellant left, Gonzales called 911.

Gonzales testified he probably could identify the watch or bracelet that was "taken" from Tricia if he saw it again. People's exhibit number three was a watch and ring, and the prosecutor showed the watch to Gonzales. The prosecutor represented that the watch was a woman's gold watch. Gonzales identified the watch, then testified, "I didn't know if it was a bracelet or a watch, but that's the same band." Gonzales did not testify that Tricia had, or was wearing, a ring, or that appellant took one from Tricia.

The following later occurred during appellant's cross-examination of Gonzales: "Q Now, you told us . . . earlier this morning that you believe you remember that the man who attacked the woman actually grabbed the bracelet or watch off her hand? [¶] A . . . he was trying to take it off forcefully, and she just took it off for him. . . . [¶]

Q In your testimony earlier, . . . you seemed to be saying there was more than one bracelet? [¶] A There were earrings and the bracelet." The following also occurred: "Q You had testified that the woman actually took her earrings off -- [¶] A Yes. [¶] Q -- and gave them to him? [¶] A That, she did take off." (*Sic*.) ~RT/927~ The earrings were gold, and may have been clip-ons. Gonzales testified that appellant "grabbed [the watch] off." ~RT/928~ When asked during cross-examination how Gonzales was so certain of his in-court identification of the watch, Gonzales replied, "When she took it off, because she took it and just handed it to him." (*Sic*.)

Gonzales told police that appellant grabbed the watch off Tricia's hand. Gonzales testified that appellant "was trying to grab it off of her to begin with, and because it was locked, she was just screaming and trying to take it off." Appellant was trying to forcibly take it off Tricia. The watch did not break when appellant ripped it off.

The following later occurred during appellant's cross-examination of Gonzales: "Q What did the man do with the earrings when [s]he took them off? [¶] A He had one in his hand and put the other one in his pocket. [¶] Q So you also said that he took a bracelet and a watch? [¶] A Well, it's the same. It's a bracelet, watch. [¶] Q . . . So there's just once bracelet? [¶] A Yeah, just one. . . ." Gonzales positively identified appellant as the assailant during a field show-up and identified him at trial.

Los Angeles Police Officer Armando Alvarez testified that about 9:45 a.m. on October 24, 2003, he received a radio call regarding an incident at 547 Seaton. Alvarez and his partner went to the location, entered the warehouse, and approached one of the offices. Alvarez and his partner saw a Black female speaking to a police sergeant. The female was bleeding, had blood on her face and clothing, had lacerations on her face, and was hysterical.

Alvarez was given a suspect description, the suspect's name, and a location where the suspect might be found. The location was the Fourth Street bridge and Santa Fe, and Alvarez went there. The address of 547 Seaton was about two or three blocks from Fourth and Santa Fe.

Alvarez went under the bridge and found appellant in a tent with two other persons. One of the other two persons was a Black male. Alvarez had appellant exit the tent and took him to the police station. Alvarez searched appellant and recovered a white or silver metal ring from appellant's left front pants pocket, and a woman's watch from his right front pants pocket. The watch was yellow and was the watch that Gonzales later identified at trial. Alvarez did not know if the ring was a man's or woman's ring. The ring looked a little big for a woman's ring. Five to ten minutes passed from the time Alvarez received the radio call to the time appellant was apprehended. Alvarez did not testify that he recovered an earring(s) from appellant.

Los Angeles Police Detective Jamie Bennett testified that on October 24, 2003, he interviewed appellant after he waived his *Miranda* rights. The prosecutor asked Bennett what appellant told Bennett about Tricia, appellant, and the occurrence on October 24. Bennett testified appellant told Bennett that appellant knew Tricia, and the two had been living together in his tent for about three weeks to a month. Appellant said his tent was in the middle of a field at Fourth and Santa Fe.

Bennett testified that appellant told him that appellant had "gotten Tricia G. onto G.R. [*sic*] and that she was a good girl." Appellant also said that Tricia had left on October 22, 2003. The prosecutor asked Bennett what appellant's demeanor was concerning Tricia's leaving, and asked if appellant said how he felt about her leaving. Bennett replied that appellant "seemed disappointed. He even mentioned that she had maybe gotten into crack, and then she left."

Appellant then told Bennett about what happened on October 24. Appellant said he was riding his bicycle and saw Tricia, and she ran into an office. Appellant also said Tricia ran away from appellant, or words to that effect, and that he followed Tricia and was trying to help her.

Bennett and his partner asked appellant how Tricia was injured. Appellant said she had fallen and he did not know. Bennett testified that appellant "thought that she had fallen against the desk and that she had hit her mouth."[2]

The following then occurred: "Q Did he say whether or not he had ever laid a hand on her? [¶] A Only that he said he tried to help her. He never admitted to punching her or beating her, no. [¶] Q Did he ever admit laying a hand on her? [¶] . . . [¶] [Bennett]: As I said, I think he said that 'I tried to help her.' I took that to mean that he had touched her to try to help her."

Bennett testified that appellant told him, "'All I know is the girl ran her butt up into the building. She's on drugs and stuff.'" Bennett also testified that appellant said, "'All I know is that the girl ran her butt up into the building and stuff.'" Tricia's injuries to her left eye were severe.[3] Appellant presented no defense evidence.

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[2] Bennett also testified that appellant stated, "'maybe she fell against the desk or hit her mouth.'"

[3] Christian Hauser, a physician's assistant at White Memorial Hospital, testified that on October 24, 2003, he was working in the emergency room and examined Tricia. Hauser had to give her ice and towels because there was blood coming from the injured socket of her left eye. Blood was flowing from her left eye and through her nose. Hauser had to replace blood-soaked towels perhaps two or three times. Tricia entered the hospital about 10:30 a.m., and Hauser last saw her about 5:00 p.m. During that period, Tricia's eye was bleeding. Tricia experienced the most severe level of pain and the most severe level of trauma to her face. Hauser was unable to examine her left eye because of the swelling. There was minimal swelling on the left side of Tricia's lip. Hauser saw Tricia walk, and testified "she was walking . . . just very slowly. Her head was down. I mean, she just looked really, really bad." Hauser also testified that Tricia looked "like somebody removing her soul."

Brian Johnston, an emergency room physician and Hauser's supervisor, was also working in the emergency room when Tricia arrived. According to Johnston, Tricia had an orbital blowout fracture. The common term for orbit is eye socket. The continued bleeding from 10:00 a.m. to 5:00 p.m. indicated significant injury to the eye. There were two bone ruptures in the eye socket. Johnston did not think he had ever before seen two blowout fractures in one orbit. The injury implied "very heavy forces of injury. . . a very significant blow to the orbit." Johnston was unable to open Tricia's eye due to the swelling. He could have opened the eye only by putting Tricia under anesthesia in an

Appellant did not request, and the court did not give, a jury instruction on the claim of right defense.[4] During jury argument, appellant's counsel commented, "Again, this woman was beaten mercilessly. She was pummeled, pounded. We heard a lot about blood. Blood was gushing out of her eye socket. It was flowing out of her nose."[5]

CONTENTIONS

Appellant contends: (1) "This court should reverse appellant's conviction for robbery, because there was insufficient evidence that appellant took property belonging to the victim, as required to sustain such a conviction"; (2) "This court should reverse appellant's robbery conviction, because the trial court improperly failed to instruct the jury regarding appellant's claim of right to the property allegedly stolen by him"; and (3) "This court should reverse appellant's conviction for simple assault, because that charge is a lesser included offense to the first count for assault with intent to inflict great bodily injury [*sic*], for which appellant was also convicted."

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operating room. Johnston arranged for a follow-up visit for Tricia, but she did not return. Obvious complications could arise from Tricia's injury, such as a detached retina or a detached lens. Bone shards could have lacerated the muscles of the eye, and there was a risk of infection, significant bleeding into the orbit, and loss of vision. There was no guarantee that the fractures would heal. If a person "hit her head on the corner of a desk, a sharp corner of a table or a desk, and that sharp corner went into her eye," it would not cause the injury suffered by Tricia. Nor did Tricia's injury result from falling face down on the flat surface of a desk. After 30 years of practice, Johnston rated Tricia's orbit blowout as most severe. Blunt force trauma was the only cause of an orbital blowout. Johnston would not expect a person to receive Tricia's type of injury from falling on an object.

[4] The following occurred during discussions concerning jury instructions: "The Court: . . . after considering all of the evidence in this case and your tactical planning, . . . have you considered all instructions, and these are the only instructions you wish given? [¶] Counsel for the People? [¶] [The Prosecutor]: Yes. [¶] The Court: Counsel for the defense? [¶] [Appellant's counsel]: Yes."

[5] Appellant's jury argument raised issues as to whether the jewelry was in fact taken, and whether appellant was the person who took it.

DISCUSSION

1. *There Was Sufficient Evidence that Appellant Committed Robbery, and the Court Did Not Err by Failing to Instruct Sua Sponte on the Claim of Right Defense.*

There is no dispute appellant committed robbery except to the extent appellant claims there was insufficient evidence that (1) the property belonged to Tricia and (2) he harbored intent to steal because he had been asserting a claim of right. Appellant also presents the related claim that the court committed reversible error by failing to instruct sua sponte on the claim of right defense using CALJIC No. 9.44.[6]

As to the first claim, robbery "is the felonious taking of personal property in the *possession of another*, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211, italics added.) Possession can be actual or constructive. (*People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 520-521; *People v. Jones* (1996) 42 Cal.App.4th 1047, 1053; *People v. Estes* (1983) 147 Cal.App.3d 23, 26.)

Actual possession requires direct physical control. (*People v. Frazer* (2003) 106 Cal.App.4th 1105, 1111; see CALJIC No. 1.24 (7th ed. 2004) "[Actual possession requires that a person knowingly exercise direct physical control over a thing."])

"As a rule, robbery may be committed against a person who is not the owner of property -- indeed, it may be committed against a thief. [Citation.] There is no requirement that the victim have an absolute right to possession of the property. . . . For the purposes of robbery, it is enough that the person presently has *some loose custody over the property, is currently exercising dominion over it*, or at least may be said to represent or stand in the shoes of the true owner." (*People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1143, italics added.) "Although the word 'possession' has several meanings in a variety of legal contexts, the reviewing courts in California have chosen a

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6 (As to the content of that instruction, see fn. 10, *post*.) There is no need to reach the issue of whether the trial court's failure to instruct on the claim of right defense was invited error. (See fn. 4, *ante*.)

definition which equates with the word 'custody' when considering the crime of robbery." (*People v. Gordon* (1982) 136 Cal.App.3d 519, 528.)

In the present case, there was substantial evidence as follows. Aranda heard someone, later identified as appellant, telling Tricia to "*Give* it to me. *Give me* my *jewelry*. *Give* me this. *Give* me that." (Italics added.) Gonzales testified that appellant told Tricia to "'*Give me* my *stuff*.'" (Italics added.) Appellant told her to "'*Give me* my *gold*.'" (Italics added.) Appellant later grabbed Tricia's hand and tried to rip a gold bracelet or watch off her hand. Appellant was yelling at Tricia, "'*Give me the rest of* my *stuff*.'" (Italics added.) The fact appellant was telling Tricia to "give" him anything provided evidence she *had* something to give.

Gonzales also testified as follows. While Tricia was lying on the desk, "she *had on* a gold bracelet and earrings[.]" (Italics added.) Appellant grabbed Tricia's hand and tried to rip a gold bracelet or watch *off* her hand. As to the watch or bracelet, appellant "just snagged it *off* and just took it *off*." (Italics added.) Tricia "took *off* the earrings[]" and "*removed* the earrings[.]" (Italics added.) As to the watch or bracelet, appellant "was trying to take it *off* forcefully, and she just look [*sic*] took it *off* for him[.]" (Italics added.) Tricia "took her earrings *off*" and gave them to appellant. (Italics added.) Appellant "grabbed [the watch] *off*." (Italics added.) Gonzales testified he was certain of his in-court identification of the watch because "When she took it *off*, because she took it and just handed it to him." (*Sic*; italics added.) Gonzales also testified that when appellant "took [the earrings] *off*," (italics added) he held one in his hand and put another in his pocket. There was no evidence that the watch and earrings were simply lying around somewhere.

Thus, although there was some ambiguity as to whether, in the commotion, appellant took off Tricia's watch and earrings, or Tricia took them off and gave them to appellant, Gonzales's testimony provided evidence that Tricia "had" the watch and earrings, and they were taken *off* Tricia, that is, she was *wearing* them.

Appellant told Bennett that appellant saw Tricia and she ran into the office. There was no evidence that Tricia first acquired the jewelry (watch and earrings) when she first

entered the building. Appellant's statement, and the later incident in the office, provided evidence that Tricia had the jewelry, and was wearing it, at least as early as when Tricia was outside, right before she ran in the building. Appellant did not tell Gonzales or Bennett that appellant followed Tricia because she had property belonging to appellant. Appellant told Bennett that appellant followed her because appellant was trying to help her. We note the watch was a woman's watch, and the jury reasonably could have concluded that the earrings were women's jewelry.

Tricia did not cheerfully acknowledge the jewelry did not belong to her. She fled from appellant, repeatedly pled for help, dialed 911, screamed, and, when appellant demanded the jewelry, she replied, "No, no." She later told appellant to leave her alone. Even when appellant initially hit her, she did not surrender the jewelry, but tried to flee with it.

When Tricia, and later Gonzales, dialed 911, appellant each time took the telephone and hung it up. The jury reasonably could have concluded that if the jewelry had belonged to appellant, he would have welcomed police involvement. The fact that he did not evidenced both consciousness of guilt and that the jewelry did not belong to him.

There is no dispute that appellant committed assault by means likely to produce great bodily injury, and that he personally inflicted great bodily injury on Tricia. Appellant conceded below that he beat Tricia mercilessly. The jury reasonably could have concluded that appellant's use of force was excessive if his goal merely had been to recover property that was his, that the excessive force provided evidence that he was not beating her to recover property that was his, and that, therefore, the property was not his but hers.

Moreover, there was substantial evidence from Gonzales's testimony that, even after appellant obtained the jewelry from Tricia, he continued cursing at her and "hit her a couple more times" before he left. Appellant's gratuitous assault of Tricia after he obtained the jewelry provided evidence that he was beating her for a reason(s) other than to recover property belonging to him, and that the property was not his but hers. We note that, according to appellant, Tricia was a good person, and Bennett testified that appellant

seemed disappointed when she left him. The jury reasonably could have concluded that appellant beat Tricia for leaving him, and masked that purpose by falsely claiming he was recovering property belonging to him.

When Bennett asked appellant how Tricia was injured, appellant said she had fallen and he did not know. He also said she had fallen against a desk and hit her mouth. However, there was substantial medical testimony concerning the severity of Tricia's injuries. Johnston also testified to the effect that Tricia's injuries would not have been caused by a fall. Appellant failed to reference Tricia's eye injuries. In light of these facts, the jury reasonably could have concluded that appellant's above statements to Bennett were fabricated, evidenced consciousness of guilt, and evidenced that he wrongly took jewelry belonging to Tricia.

Appellant waived his *Miranda* rights and voluntarily spoke with Bennett. Bennett testified that appellant told Bennett about what happened on October 24, 2003, but Bennett did not testify that appellant ever told Bennett that Tricia had jewelry, or any other property, belonging to appellant. In fact, Bennett testified that appellant stated, "'*All I know is* the girl ran her butt up into the building. She's on drugs and stuff.'" (Italics added.) If appellant's statement were true, he was denying knowledge that Tricia had property belonging to him.

We conclude there was substantial evidence that Tricia (1) had "direct physical control" over the jewelry (watch and earrings), (2) had at least "loose custody" over the jewelry, and (3) was currently exercising dominion over it. That is, we conclude there was substantial evidence that she possessed it.

The fact that appellant protested that the jewelry was his does not compel a contrary conclusion. We assume a defendant cannot rob someone of property that the defendant owns.[7] However, the substantial evidence that the jewelry (watch and

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[7] See *People v. Ammerman* (1897) 118 Cal. 23, 26 ["The ownership of the property in some person other than the accused is deemed to be as essential in making out the crime of robbery as any other element of the offense expressed in the statute[.]"]; *People v. Vice* (1863) 21 Cal.344, 345 ["It is not necessary that the property should belong to the

earrings) was in the possession of Tricia at the time of the taking is substantial evidence that she owned it.[8] Thus, there was substantial evidence that Tricia possessed and owned the jewelry. The fact that appellant claimed the jewelry belonged to him simply provided an evidentiary conflict that the jury resolved against him. This is not a case in which uncontradicted evidence established that appellant owned the property and Tricia merely possessed it. We hold there was substantial evidence, for purposes of Penal Code section 211, that Tricia actually possessed the jewelry (watch and earrings) and that it belonged to her. (Cf. *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206; *People v. Davis*, *supra*, 97 Cal. at p. 195; *People v. Hamilton*, *supra*, 40 Cal.App.4th at p. 1143; *People v. Gordon*, *supra*, 136 Cal.App.3d at pp. 528-529; Pen. Code, § 211; see *People v. Gilbeaux*, *supra*, 111 Cal.App.4th at pp. 520-521; *People v. Frazer*, *supra*, 106 Cal.App.4th at p. 1111.)

Appellant also claims there was insufficient evidence that he harbored the requisite intent to steal for robbery because he had been asserting a claim of right. "The claim-of-right defense provides that a defendant's *good faith* belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft *or* robbery." (*People v. Tufunga* (1999) 21 Cal.4th 935, 938 (*Tufunga*), italics added.) We note that nowhere in appellant's briefs does he expressly refer to the good faith requirement.

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party from whose possession it was forcibly taken. It is requisite, however, that it should belong to some other person than the defendant. The owner of property is not guilty of robbery in taking it from the person of the possessor, though he may be guilty of another public offense."].

8 Cf. *People v. Davis* (1893) 97 Cal. 194, 195 ["The fact that the property was in the possession of Jane Doe at the time of the taking is sufficient evidence of the ownership by her. It was said in *People v. Nelson* [(1880)] 56 Cal. 82: 'The money was in the possession of Ah Chung, and was taken from his person by the defendants. Therefore it was presumptively his property, and that was sufficient proof of ownership.'"].

We believe Penal Code section 511,[9] containing the *statutory* claim of right defense, illuminates the nature of the good faith belief required by Penal Code section *211*.[10] In *People v. Stewart* (1976) 16 Cal.3d 133 (*Stewart*), our Supreme Court observed, "California authority in interpreting [Penal Code] section 511 has indicated that

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[9] Penal Code section 511, states, in relevant part, "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred *in good faith*, even though such claim is untenable." (Italics added.)

[10] Like the previously quoted language in *Tufunga*, the CALJIC instruction pertaining to claim of right applies the defense to theft *or* robbery. CALJIC No. 9.44 (7th ed. 2003), in effect at the time of (but not given in) the present case, states, in relevant part, "An essential element of the crime of [robbery] [theft by larceny] is a specific intent permanently to deprive the alleged victim of . . . her property. That specific intent does not exist if the alleged perpetrator had a *good faith* claim of right to title or ownership of the specific property taken from the alleged victim. In other words, if a perpetrator seeks to regain possession of property in which [he] . . . honestly believes [he] . . . has a *good faith* claim of ownership or title, then [he] . . . does not have the required criminal intent. [¶] . . . [¶] If, after a consideration of all the evidence, you have a reasonable doubt that [defendant] [perpetrator] possessed the required specific intent, you must find [him] . . . not guilty of the crime[s] of [robbery] [theft by larceny]."

Tufunga states that the "Legislature over 100 years ago codified in the current *robbery statute* the common law recognition that a claim-of-right defense can negate the *animus furandi* element of robbery where the defendant is seeking to regain specific property in which he *in good faith* believes he has a bona fide claim of ownership or title." (*Id.* at p. 950, first and third italics added.)

As for *thefts*, Penal Code section 511, sets forth a statutory claim of right defense. Penal Code section 511, "may be read as providing a statutory claim-of-right defense to all theft-related charges, . . ." (*Tufunga, supra,* 21 Cal.4th at pp. 953, fn. 4.)

Tufunga and CALJIC No. 9.44 apply the claim of right defense to theft and robbery alike. We note theft by larceny is a lesser included offense of robbery. (*People v. Brew* (1991) 2 Cal.App.4th 99, 105-106.) Because Penal Code section 211, by itself, incorporates the recognition that a claim of right can negate intent to steal, that defense can be applied in a robbery case without reliance on Penal Code section 511 per se. Nonetheless, because *Tufunga* and CALJIC No. 9.44 apply the claim of right defense to theft and robbery alike without expressly distinguishing the source of that defense (Penal Code section 211 as to robbery, Penal Code section 511 as to theft), we believe we may rely on Penal Code section 511, to illuminate the good faith requirement of the claim of right defense statutorily recognized by Penal Code section 211.

where an individual *honestly* believes that he is authorized to appropriate and use property which he is accused of embezzling, the fraudulent intent which is a necessary element of that crime is absent. . . . [¶] . . . , it is clear not only from the terms of [Penal Code] section 511 but from statements in numerous authorities that a belief in one's authority to appropriate is a defense *only when maintained in 'good faith.'* [Citations.]" (*Stewart*, *supra*, 16 Cal.3d at p. 139, italics added.) *Stewart* later stated, "Subsequent cases have explained that, 'Whether a claim is advanced in good faith does not depend *solely* upon whether the claimant *believes* he was acting lawfully; the *circumstances* must be indicative of good faith.' [Citations.] For example, the circumstances in a particular case might indicate that although defendant may have 'believed' he acted lawfully, he was *aware* of contrary facts which rendered such a belief wholly unreasonable, and hence in bad faith." (*Stewart*, *supra*, 16 Cal.3d at p. 140, italics added.)

We assume without deciding that appellant's repeated demands that Tricia give to him jewelry which he was claiming was his provided evidence that appellant believed he had a right or claim to the jewelry. However, any such belief had to be in good faith.

We previously have discussed a number of facts that evidence that Tricia possessed the jewelry and it belonged to her. We believe those facts, coupled with appellant's *awareness* of most if not all of them, provide substantial evidence that (1) appellant was aware of facts which rendered wholly unreasonable any belief he had that he had a claim of right, and (2) the circumstances were indicative of bad faith.[11]

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11 There was substantial evidence as follows. Appellant was *aware* Tricia had the jewelry appellant demanded and that she was wearing it, that is, he was aware that she possessed it. He knew the jewelry, that is, the watch and earrings, were women's jewelry. He was aware that Tricia never expressly acknowledged that the jewelry belonged to appellant and not Tricia. When Tricia and Gonzales called the police, appellant hung up the telephone. He knew he was rejecting police involvement which he should have welcomed, and that his rejection was motivated by consciousness of guilt and that he was not claiming the jewelry was his.

Moreover, appellant was *aware* his use of force was excessive if his goal merely had been to recover property that was his, knew he gratuitously beat Tricia even after he obtained the jewelry, and therefore knew he was not beating her to recover jewelry belonging to him. Appellant was aware that Tricia was a good person and that he had

Moreover, there was no substantial evidence that the circumstances were indicative of good faith. The sole evidentiary basis for appellant's claim of right defense with respect to the watch and earrings was what he did in the office when he was getting that jewelry from Tricia. As for what happened before appellant entered the office, appellant told Bennett that appellant was riding his bicycle, saw Tricia, followed her, and tried to *help* her. Appellant did not tell Gonzales or Bennett that appellant followed Tricia to recover property. Bennett did not testify that appellant told Bennett anything about the history of the jewelry (e.g., when, where, or from whom appellant allegedly first acquired it; its value; etc.) to support a claim of right. After appellant obtained the jewelry he voluntarily spoke with Bennett, but made no reference to jewelry. Bennett did not testify that appellant told Bennett that appellant reported to police that Tricia had property that appellant believed was his. (Cf. *Romo*, *supra*, 220 Cal.App.3d at p. 520 ["evidence of a claim alone, without more, will not support a claim-of-right defense."])

We note an intent to steal may ordinarily be inferred when one person takes the property of another, particularly if he takes it by force. (*Tufunga*, *supra*, 21 Cal.4th at p. 943.) There was substantial evidence appellant so took the jewelry (watch and earrings) from Tricia. We hold there was substantial evidence that appellant had the requisite intent to steal the watch and earrings. We also hold there was no substantial evidence supporting a claim of right defense, that is, that appellant had a *good faith* belief that he had a right or claim to that jewelry. (Cf. *Tufunga*, *supra*, 21 Cal.4th at p. 943;

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been disappointed when she left him. He knew he had mercilessly beaten Tricia, knew she had not received her injuries during a fall, and fabricated that she had injured herself during a fall because he was conscious of his guilt and that he had not beaten her to recover property he was claiming was his. The jury reasonably could have concluded that appellant beat Tricia for leaving him, and that he tried to mask that purpose by claiming he believed she had property belonging to him.

During appellant's voluntary interview with Bennett, appellant did not tell Bennett that appellant was trying to recover jewelry that he believed belonged to him. When appellant told Bennett, "'*All I know is* the girl ran her butt up into the building. She's on drugs and stuff[,]'" (italics added), appellant was denying knowledge that Tricia had property that he was claiming belonged to him.

People v. Ochoa, *supra*, 6 Cal.4th at p. 1206; Cf. *Romo*, *supra*, 220 Cal.App.3d at p. 520; Pen. Code, § 211.)[12]

Finally, a claim of right instruction need be given only if the defense is supported by substantial evidence. (Cf. *Tufunga*, *supra*, 21 Cal.4th at p. 944; *People v. Creath* (1995) 31 Cal.App.4th 312, 319-320; *Romo*, *supra*, 220 Cal.App.3d at pp. 517-520; *People v. Vineberg* (1981) 125 Cal.App.3d 127, 137-138.)[13] In light of our conclusion

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12 Appellant, citing *People v. Romo* (1990) 220 Cal.App.3d 514, 518, and *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1017, asserts "The claim of right need not be accurate or even *reasonable*; instead, an *unreasonable* belief in the legal right to take such property may suffice." (Italics added.) *Alvarado* nowhere discusses the reasonableness or unreasonableness of the belief proffered to support a claim of right. *Romo*, citing *People v. Butler* (1967) 65 Cal.2d 569, 573, states, "A defendant need not show his mistaken claim-of-right was reasonable. An unreasonable belief that he had a legal right to take another's property will suffice so long as he can establish his claim was made in good faith." (*Romo*, *supra*, 220 Cal.App.3d at p. 518.) *Butler* nowhere discusses the reasonableness or unreasonableness of the belief proffered to support a claim of right. In any event, apart from whether *Romo*'s pronouncement might be correct when a defendant is *unaware* of contrary facts which rendered the belief wholly unreasonable, *Romo's* pronouncement is not true where, as here, the circumstances were indicative of bad faith and the defendant was "*aware* of contrary facts which rendered such a belief wholly unreasonable, and hence in bad faith." (*Stewart*, *supra*, 16 Cal.3d at p. 140, italics added; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We note that Penal Code section 511, indicates that a claim may be in good faith even though the claim is "untenable," and the section does not use the word "unreasonable."

13 *Romo* stated, "There is evidence implying [the defendant's] actions may have been motivated by *revenge*, but none suggesting he in good faith believed the law allowed him to take the [property] . . . . [¶] . . . [¶] Because there was no substantial evidence supporting the [claim of right] instruction, the trial court properly refused it." (*Romo*, *supra*, 220 Cal.App.3d at pp. 519-520, italics added.)

People v. Flora (1991) 228 Cal.App.3d 662 (*Flora*), is illuminating. In that case, the defendant was convicted of a felony violation of a child custody order and contended on appeal that the trial court erroneously had refused to instruct the jury on mistake of law as a defense. (*Flora*, *supra*, 228 Cal.App.3d at pp. 664, 669.) *Flora* rejected the contention (*id.* at p. 669) and stated, "a mistake of law instruction is only appropriate where the evidence supports a reasonable inference that the claimed mistake was held in good faith. (*People v. Stewart* (1976) 16 Cal.3d 133, 140 . . . .) [¶] Here, appellant's conduct does not comport with his claim of good faith. The manner in which appellant

that there was no substantial evidence supporting a claim of right defense, the court did not err by failing to give CALJIC No. 9.44 (see fn. 10, *ante*) on claim of right. (Cf. *People v. Creath*, *supra*, 31 Cal.App.4th at p. 320; *Romo*, *supra*, 220 Cal.App.3d at pp. 517-520; *People v. Vineberg*, *supra*, 125 Cal.App.3d at pp. 137-138.)[14]

2. *Appellant's Conviction of Assault as a Lesser Included Offense of Count Four Must be Stricken.*

a. *Pertinent Facts.*

The information alleged, inter alia, that appellant committed assault by means likely to produce great bodily injury (count one), second degree robbery (count two), criminal threats (count three), and corporal injury to a cohabitant, spouse, or child's parent (count four).

In its verdicts as orally rendered, the jury convicted appellant on counts one and two,[15] acquitted him on count four, convicted him of assault as a lesser included offense of count four, and acquitted him of committing battery on a former girlfriend (Pen. Code, § 243, subd. (e)) as a lesser included offense of count four. The jury rendered no

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forcibly took [the child], detained him, and concealed him from [the mother] and the law belies his protestation of good faith. *If appellant truly believed* that the Washington order was invalid . . . , *he would not have acted as he did . . . appellant only succeeded in demonstrating his consciousness of guilt*." (*Flora*, *supra*, 228 Cal.App.3d at p. 669, italics added.)

[14] Gonzales never mentioned a ring in his testimony, although Alvarez recovered one from appellant. Alvarez did not know if the ring he recovered was a man's or woman's ring, and it looked a little big for a woman's ring. To the extent appellant relies on the ring to argue that (1) there was insufficient evidence of robbery because the ring he took from Tricia belonged to him and he had a claim of right to such property, and (2) the trial court erred by failing to instruct on claim of right, we reject the argument. There was no substantial evidence that appellant took a ring belonging to appellant or anyone else from Tricia, a fortiori, no substantial evidence that he took a ring from her which he believed was his.

[15] As mentioned, appellant's motion for judgment of acquittal as to count three was granted.

oral verdict as to whether appellant committed battery (Pen. Code, § 242) as a lesser included offense of count four. The parties waived reading of the verdicts as recorded.

Jury verdict forms confirm all of the above mentioned orally rendered verdicts, except that a verdict form reflects that the jury found appellant guilty of battery as a lesser included offense of count four.

In sum, although the jury rendered no oral verdict as to whether appellant committed battery as a lesser included offense of count four, a jury verdict form reflects that the jury found appellant guilty of exactly that offense. Both the jury's verdict as orally rendered, and a jury verdict form, confirm that the jury found appellant guilty of assault as a lesser included offense of count four.

Appellant's total prison sentence of 20 years included a sentence on count one. When the court began sentencing appellant on count four, appellant commented he had been acquitted on that count. The court indicated it was going to impose and stay punishment, and that the court was not "going to add any more time." However, the court also indicated appellant had been convicted of a lesser offense of count four. Appellant's counsel correctly later stated, "it was a lesser *assault*, which carries a six-month maximum sentence." (Italics added.) However, the court then stated, "Right. So on count four, the lesser included offense, pursuant to [Penal Code section] *242*, a misdemeanor, six months." (Italics added.) The court ordered that that six-month sentence run concurrent.

b. *Analysis.*

In the table of contents of appellant's opening brief, appellant lists his third contention as, "This court should reverse appellant's conviction for simple *assault*, because that charge is a lesser included offense to the *first count* for assault with intent to inflict great bodily injury [*sic*], for which appellant was also convicted." (Italics added; some capitalization omitted.) However, in the argument section of appellant's opening brief, the third argument heading is, "This court should reverse appellant's conviction for simple *battery*, because that charge is a lesser included offense to the *first count* for

assault with intent to inflict great bodily injury [*sic*], for which appellant was also convicted." (Italics added; some capitalization omitted.)

In his argument under the third heading, appellant asserts he was convicted of *battery* as a lesser included offense of count *one*. He urges that multiple convictions on count one, and battery as a lesser included offense of count one, were improper, and also urges that multiple punishment for those offenses was improper. Appellant's argument makes no reference to the jury's oral verdict that he was convicted of assault as a lesser included offense of count four.

Respondent urges that battery is not a lesser included offense of felonious assault, therefore, multiple convictions for felonious assault, and battery, were proper. Respondent concedes that multiple punishment for those offenses was error. Respondent makes no reference to the jury's oral verdict that appellant was convicted of assault as a lesser included offense of count four.

The oral declaration of the jurors endorsing the result, not the written verdict form, is the true return of the verdict. (*People v. Lankford* (1976) 55 Cal.App.3d 203, 211; *People v. Mestas* (1967) 253 Cal.App.2d 780, 786.) Appellant was thus convicted of assault as a lesser included offense of count four, and was not convicted of any battery.

As mentioned, appellant claims that multiple convictions and punishment on felonious assault, and assault as a lesser included offense of felonious assault, were improper. However, as mentioned, appellant also claims that multiple convictions and punishment on felonious assault, and battery as a lesser included offense of felonious assault, were improper.

Appellant's first claim is set forth only in the table of contents of his brief, and is not supported by an express argument on the issue. Only appellant's claim that multiple convictions and punishment on felonious assault, and battery as a lesser included offense of felonious assault, is supported by argument in his brief. Under these circumstances, we might view appellant's first claim as improperly presented. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11 [matters perfunctorily asserted on appeal without argument may be rejected].)

However, assault is indisputably a lesser included offense of battery (*People v. Fuller* (1975) 53 Cal.App.3d 417, 421 (*Fuller*)), accordingly, we will treat appellant's first claim -- that multiple convictions and punishment on felonious assault, and *battery* as a lesser included offense of felonious assault, were improper -- as implying a claim that multiple convictions and punishment on felonious assault, and *assault* as a lesser included offense of felonious assault, were improper.

There was no dispute below, and there is no dispute here, that appellant's multiple blows during his short, continuous attack on Tricia constituted a single assault, whether that assault was felonious assault or simple assault. (Cf. *People v. Oppenheimer* (1909) 156 Cal. 733, 740; *People* v. *Robbins* (1989) 209 Cal.App.3d 261, 266; *People v. Madison* (1969) 3 Cal.App.3d 984, 986; *People v. Mitchell* (1940) 40 Cal.App.2d 204, 211; see *In re Robert W.* (1977) 68 Cal.App.3d 705, 717.)

We considered inviting supplemental briefing from respondent on the issue of whether multiple convictions and punishment on felonious assault, and assault, were improper. However, if the parties had reviewed more carefully the record, they would have been aware that the jury, in its orally rendered verdict, found appellant guilty of, inter alia, assault, not battery. Moreover, since respondent concedes that multiple punishment on felonious assault, and battery (although appellant was not convicted of battery), was improper, respondent would have to concede that multiple punishment on felonious assault, and assault, was improper. Further, *Fuller*, the case (and one of two cases) respondent cites in support of the proposition that multiple punishment on felonious assault, and battery, was improper, also states the truism that felonious assault includes the elements of assault. Accordingly, there can be no real dispute that appellant properly could not have been convicted of felonious assault, and assault, based on the same incident. Therefore, we will strike appellant's misdemeanor conviction for assault as a lesser included offense of count four, leaving otherwise unaffected his 20-year prison sentence.

DISPOSITION

The judgment is modified by striking appellant's conviction for assault as a lesser included offense of count four and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modification.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, J.

We concur:

KLEIN, P.J.

ALDRICH, J.